Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Consumer Bankers Association Petition for Expedited Declaratory Ruling with Respect to Certain Provisions of the Indiana Revised Statutes and the Indiana Administrative Code	CG Docket No. 02-278
In the Matter of Consumer Bankers Association Petition for Expedited Declaratory Ruling with Respect to Certain Provisions of the Wisconsin Statutes and Wisconsin Administrative Code	CG Docket No. 02-278
In the Matter of National City Mortgage Co. Petition for Expedited Declaratory Ruling with Respect to Certain Provisions of the Florida Statutes	CG Docket No. 02-278

COMMENTS OF THE AMERICAN FINANCIAL SERVICES ASSOCIATION IN SUPPORT OF PETITIONS FOR DECLARATORY RULINGS FILED BY THE CONSUMER BANKERS ASSOCIATION AND NATIONAL CITY MORTGAGE CO.

The American Financial Services Association ("AFSA") appreciates this opportunity to comment on the Proposed Rule issued by the Federal Communications Commission (the "Commission"). AFSA submits these comments in support of the Petitions for Declaratory Ruling filed on November 19, 2004, by the Consumer Bankers Association and on November 22, 2004, by National City Mortgage Co., asking the Commission to rule that certain provisions of Indiana, Wisconsin, and Florida law and regulations cannot be applied to interstate telemarketing.

AFSA is the national trade association for consumer credit providers. The credit products offered by AFSA's members include personal loans, first and second mortgage loans, home equity lines of credit, credit card accounts, retail sales financing and credit insurance.

AFSA files these comments because many of its members are significant users of interstate telephone service to market their products and services, and for other purposes relevant to their businesses.

1. Preemption of inconsistently restrictive state laws is essential to efficient conduct of business by interstate telephone.

AFSA strongly endorses the finding that the Commission has already made in this proceeding:

> "We conclude that inconsistent interstate rules frustrate the federal objective of creating uniformed national rules, to avoid burdensome compliance costs for telemarketers and potential consumer confusion. . . . [A]pplication of inconsistent rules for those that telemarket on a nationwide or multi-state basis creates a substantial compliance burden for those entities."[1]

The Federal rules restricting telemarketing – the Telephone Consumer Protection Act ("TCPA") and the FCC's Order implementing rules under it ("FCC Rule") – have already

[1] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 18 F.C.C. Rcd 14014 ¶83 (2003)("FCC Rule").

dramatically reduced the volume of telemarketing calls and have adequately addressed concerns about their intrusive effect, striking the right balance in recognition of the value of the interstate telephone channel as an efficient means of delivering goods, services, and messages. AFSA members who conduct telemarketing activities are equipped to comply with those Federal rules, now and in the future.

State laws, such as those of Indiana, Florida and Wisconsin, that significantly deviate from the Federal regime impair interstate commerce in telephone traffic, which should be the exclusive domain of this Commission. Divergent rules in multiple states increase the expense and operational burdens on nationwide telemarketing activities, resulting in less service to all states, and higher risks of operational errors leading to inadvertent non-compliance.

The common theme of the state laws that are the subject of these petitions is refusal by the states to recognize the federal concept of an established business relationship, to the extent that that concept is expressed in federal law. That concept, and the overall framework of the TCPA of which it is a part, are very important to AFSA member institutions for a number of reasons, associated with the changing nature of the financial services industry in the 21st century.

- Large modern financial institutions, in contrast to the financial institutions of prior centuries which did business primarily through branches, face-to-face with their customers, rely heavily on direct channels such as the telephone to do business with large numbers of remotely located consumers. Regulation of telemarketing is therefore a subject of much greater importance to financial institutions than in past eras.
- Financial services are increasingly delivered by Nationwide or multi-state institutions, whose telemarketing activities are likely to be interstate and hence are within the

scope of the TCPA and should be beyond the scope of the state laws at issue in these petitions.

- A substantial part of financial institutions' telemarketing activities involve consumers with whom the institutions have existing business relationships, as defined in the TCPA and the FCC Rule. All of the state laws at issue here restrict financial institutions' ability to conduct that activity.
- Much of the value to consumers of a diversified financial institution lies in its ability to offer those consumers an array of financial products and services. Wisconsin's law does not allow telemarketing of products or services beyond those that are the substance of the existing business relationship, and therefore does not recognize the nature and special value of modern diversified financial institutions.
- All of the state laws at issue in these petitions restrict the ability to offer products and services of affiliates of the legal entity having the original business relationship with the consumer. In the financial world, however, different lines of business often must be carried on through separate legal entities, housed within the larger family of affiliated companies. This is so for reasons of financial institution regulation that have nothing to do with the policy objectives of the TCPA and the FCC Rule.

For all of these reasons, the TCPA and FCC Rule are consistent with the nature and practices of the 21st century financial services system in America, and the state laws at issue in these petitions are not. Those laws need to be preempted in order to facilitate efficient delivery of financial products and services for the benefit of all financial consumers.

2. Preempting burdensome state laws is well within the authority of the Commission.

The Telephone Consumer Protection Act is structured on the assumption that interstate telephone commerce would be subject to the uniform national rules that the Act created and authorized the Commission to adopt, and not to a patchwork of state laws. The Act's provision that addresses the relationship between the Act and state law authorizes states to impose "more restrictive *intrastate* requirements" (47 USC, §227(e)), a provision that would be unnecessary if states were not already preempted, by the Communications Act of which the TCPA is a part, from regulating *interstate* telephone service. The legislative history of the TCPA confirms this understanding, and includes such statements as "states do not have jurisdiction over interstate calls."[2] In the Congressional Record, Senator Hollins stated: "Pursuant to the general preemptive effect to the Communications Act of 1934, State regulation of interstate communications, including interstate communications initiated for telemarketing purposes, is preempted."[3] That conclusion has been affirmed by the Federal courts.[4]

The petitions at issue here – involving the telemarketing laws of Indiana, Wisconsin, and Florida – are the second set of petitions that the Commission has received and published for comment. They are evidence of the fact that the Commission's hope that states would align their laws with the new federal law and rules is not being realized. Instead, states are disregarding the federal law and the uniform system that it sought to create. Case-by-case consideration of these state laws, it is now apparent, only encourages the states to resist the advent of the uniform regime, consuming the Commission's resources in these individual preemption proceedings, as

[2] S. Rep. No. 102-178, p. 3, S. Rep. No. 177, page 3.

[3] 137 Cong. Rec. S18781, p. 10.

[4] Nicholson v. Hooters of Augusta, 136 F.3d 1287, 1288 (11th Cir. 1998); International Science Technology Institute Inc., v. Inacom Communications, Inc., 106 F.3d 1146, 1154 (4th Cir. 1997); Chair King, Inc. v. Houston Cellular Corp., 131 F.3d 105, 113 (5th Cir. 1997); Moser v. FCC, 46 F.3d 970, 972 (9th Cir. 1995).

well as the petitioners' resources. In addition, the case-by-case approach is having a chilling effect on commercial activity, and is delaying the establishment in fact of the uniform system and free flow of commerce that is a principal reason for the federal constitutional framework in America. The solution to this problem is that the Commission should issue a general declaration that state statutes inconsistent with the Telephone Consumers Protection Act and the FCC Rule are preempted. The simplest way to achieve that, and to avoid case-by-case proceedings, is to declare that any state restrictions of interstate telemarketing activity are preempted. The Commission would thereby bring this unsettled chapter to a close, and allow market participants to carry on business under a known system of uniform law.

For the foregoing reasons, AFSA asks that the Commission grant the petitions for declaratory rulings, and to go further and declare that the TCPA and FCC Rule preempt any state regulation of interstate telemarketing activity. AFSA appreciates the opportunity to comment on the Proposal and again thanks the Commission for its efforts. Should you have any questions about this letter, please do not hesitate to contact the undersigned at (202) 466-8606.

Respectfully submitted,

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